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In the Supreme Court of the United States

October Term, 1954.

No. 184.

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma, ET AL., *Appellants,*

vs.

LEE OPTICAL OF OKLAHOMA, INC., ET AL., *Respondents.*

On Appeal from the District Court of the United States for the Western District of Oklahoma.

PETITION OF RESPONDENTS LEE OPTICAL OF OKLAHOMA, INC., ELLIS CARP AND ORAN RIPS FOR A REHEARING.

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Lee Optical of Oklahoma, Inc., Ellis Carp and Oran Rips, respondents in No. 184, present this, their petition, for a rehearing of the above-entitled cause and in support thereof respectfully show:

I.

Petitioners concede that the day is past when this Court will use the Due Process Clause of the Fourteenth

Amendment to strike down state laws regulatory of business or industrial conditions merely because they may be unwise, improvident or out of harmony with a particular school of thought. But where, as here, the uncontradicted evidence establishes that Section 2 in most cases exacts a needless, wasteful requirement of the public and that its effect is to take a major portion of an entire craft's business from it and to transfer that business to a group possessing no greater, and in many cases inferior, qualifications to perform the transferred functions, the statute assumes proportions extending far beyond improvidence or lack of wisdom. Petitioners with all earnestness and sincerity respectfully urge that if due process under the Fourteenth Amendment means anything—if its language imposes any restriction upon a state legislature's enactments—it must prohibit just such a needless, wasteful requirement and the consequent interference with a qualified craft's right to pursue a lawful occupation as is imposed by Section 2 of the Oklahoma Act unless, in fact, some improvement can be shown fairly compensating for the harm inflicted.

The opinion of this Court dated March 28, 1955, in this appeal and in No. 185 holds that Title 59, Oklahoma Statutes Annotated, §942, does not violate the Due Process Clause of the Fourteenth Amendment because the Oklahoma Legislature (a) might have concluded that the frequency of occasions when a prescription for eyeglasses is necessary was sufficient to justify the regulation of the fitting of eyeglasses to the face, (b) might have concluded that in the duplication of lenses a prescription was needed often enough to require one in every case or (c) may have concluded that eye examinations were so critical that every change in frames and every duplication of a lens should be accompanied by a prescription.

The opinion recognizes, however, that Section 2 may exact a needless, wasteful requirement in many cases. The expert testimony establishes beyond any doubt that the requirement is needless and wasteful in the vast majority of the thousands of cases involving the duplication and replacement of eyeglasses and lenses and, in fact, serves a useful purpose, in only a limited fashion, in but a few instances. The evidence is irrefutable that the optician can easily supply new frames, duplicate eyeglasses, or duplicate lenses without reference to a written prescription with the same effect as if a prescription were on hand except under very rare conditions. Each of these rare instances is treated by the medical witnesses as a phenomenon of no practical importance for two reasons: (a) the rarity of the situation is such that it has no significance to the mass of dealings in eyeglasses, and (b) since the sole function of an eyeglass is to correct a refractive error by optics, rather than to treat or alter a physical condition, an eyeglass cannot physically harm the patient even if error be made, and a patient will not wear an eyeglass that does not enable him to see well and comfortably. Not only, therefore, does the evidence incontrovertibly establish that the prescription requirement of Section 2 is needless and wasteful for the vast majority of the people of Oklahoma, but also it establishes that the statute is of only conjectural benefit to a very few Oklahomans and that, on the other hand, it inevitably deprives an ancient and lawful craft of a substantial part of its livelihood.

If, therefore, the Court's premise that the frequency of unusual cases may authorize the legislature to impose hard conditions upon the public and a group of workers be correct, then surely the legislature's conclusions with respect to the frequency of such cases must be based upon

facts, not speculation; for the frequency of cases in which a prescription must contain some data in addition to the power of the lens is a medical fact subject to statistical determination. If, because of the existence of such rare situations, a state legislature may exact needless, wasteful requirements having the effect of expropriating a major portion of the means of livelihood of some of its citizens, then surely the incidence of rarity becomes a factor determinative of the right of the legislature constitutionally to harass the many in order to protect the few. Surely the legislature may not determine to be frequent that which in fact is rare, or determine to be an appreciable hazard that which is insignificant. And if the test of due process is the frequency in occurrence of the evils sought to be eliminated by a state police power measure, then there must be some standard for the relative frequency or incidence of those occasions to determine when due process has been denied. Certainly, an incidence of one in 500 is not the equivalent of one in 100,000 for the purposes of due process.

If such be the constitutional proposition posed in this case, then it is respectfully submitted that the incidence of rarity becomes a significant constitutional fact. Unless the due process clause is eliminated as a means of protecting the public against legislation designed solely to promote the welfare of an infinitesimal few, the incidence of recurrence of the situations promoting the legislation must be determined. And if evidence of mere rarity as proved in this case be not adequate, then it would seem that the case should be remanded to the district court to ascertain statistically the incidence of rarity upon which the legislature acted.

Also, the Court's opinion indicates that Section 2 may be upheld because it may tend to produce a greater

frequency of eye examinations although it is recognized that such examinations are not directly required. However, it would seem that instead the tendency will be greater to produce vast numbers of medically wasteful eye examinations than to induce needed eye examinations, for the customers for duplicate eyeglasses and lenses will certainly be, to say the least, preponderantly persons who are in their opinion seeing well with comfort. Since that is the sole objective and accomplishment of eyeglasses, the majority of such customers will be harassed solely to create a presumably favorable climate for the few to take a step toward their own comfort which they have voluntarily declined to do.

Medical authorities in this case have testified that erroneously fitted eyeglasses are harmless and, in fact, do not present as much threat to the purchaser as a badly fitted pair of shoes, for such shoes can produce physical injury to the feet, whereas eyeglasses cannot physically improve or damage the eye. Fundamentally, therefore, this case is not as strong as would be the hypothetical one of a statute requiring all inhabitants of a state to buy shoes only upon prescription of a chiropodist. Can a state constitutionally require all of its inhabitants to buy shoes only on a doctor's prescription simply because some unknown but minute minority of its citizens should consult a chiropodist and have chosen not to do so? Weaken this hypothetical case by the proposition that, unlike shoes, the citizens who need, but have not, new prescriptions for eyeglasses are not doing themselves any physical harm and by the second proposition that Section 2 does not require, but merely tends to cause, these recalcitrants to obtain an eye examination, and the present case emerges in its true perspective. Surely the public and the opticians whose means of liveli-

hood are thus adversely affected can be protected against such capricious legislation.

Petitioners do not mean to urge upon this Court that the Federal Constitution permits courts to weigh the wisdom of debatable propositions or the relative merit of differing schools of thought. Admittedly, those are subjects lying exclusively within the province of the legislature. But petitioners do urge that a state legislature may not disregard or ignore scientific facts and speculate wildly and erroneously, even though in good faith, as to the desirability of "blank check" prescriptions which are needless and wasteful to the public and disastrous to an entire group of workers, where the sole conceivable merit to the requirement of a prescription is a conjectural improvement in the seeing comfort of a few rare individuals.

II.

In the final analysis the ultimate effect of Section 2 on the optician is no different from the effect of the statute involved in *Wieman* v. *Updegraff*, 344 U. S. 183, on the non-swearing college teachers, for Section 2 denies the optician the right to earn a living in his chosen calling. In the *Updegraff* case the college teachers refusing to take the test oath that failed to include *scienter* as an element, were, under the statute, deprived of their chosen teaching positions in the state institutions. This Court held that constitutional protection did extend to a public servant whose exclusion from his job pursuant to a statute was patently arbitrary or discriminatory. Admittedly, Oklahoma, if it considered opticianry as practiced in that state in need of regulation in order to give its people the best possible visual care, could have enacted a measure prescribing educational and other qualifications for op-

ticians without violating constitutional protections. But Section 2 is not such a measure. Rather it is a law prohibiting anyone other than an Oklahoma licensed optometrist or ophthalmologist from holding himself out to the public as qualified to do acts customarily and historically done by opticians and, by its requirement of a written prescription, having the effect of transferring the optician's business in the replacement eyeglass field to the optometrist, when the optometrist is no better, if as well, qualified in those functions than the optician. Thus the question present in this case is similar, so far as opticians are concerned, to that decided in the *Updegraff* case. The same arbitrary deprivation of a means of livelihood found objectionable in *Updegraff* is presented here, and, in addition, the vice not present in *Updegraff,* that this end is accomplished only by imposing useless, wasteful requirements upon the general public. Petitioners respectfully urge that Section 2 of Oklahoma act more clearly violates due process than did the test oath statute in the *Updegraff* case. Both statutes arbitrarily and capriciously interfere with a citizen's right to follow a lawful calling.

Conclusion.

Petitioners sincerely and conscientiously believe that an important and vital question of constitutional due process is presented by this appeal and this Court's opinion. For that reason, even though they fully recognize that petitions for rehearing rapidly pass into the limbo of forgotten things, they consider it incumbent upon themselves to respectfully urge that a rehearing be granted for the reasons set forth above and that upon rehearing, the judgment of the District Court for the Western District of Oklahoma be affirmed.

Respectfully submitted,

/s/ JOHN M. PHILLIPS

JOHN M. PHILLIPS

/s/ DICK H. WOODS

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April 20, 1955

Certificate of Counsel.

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

/s/ JOHN M. PHILLIPS

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/s/ DICK H. WOODS

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